

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DBE MANAGEMENT, LLC D/B/A DBE
UTILITY SERVICES,

Petitioner,

vs.

Case No. 21-3153BID

CITY OF CAPE CORAL,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, the final hearing was held on November 22, 2021, before the Honorable Francine M. Ffolkes, a duly designated Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the bid received from DBE Management, Inc., after the corporation converted to DBE Management, LLC, was non-responsive to the requirements set forth in the Invitation to Bid (ITB), and, thus, properly rejected by the City of Cape Coral (City).

PRELIMINARY STATEMENT

This action derives from a formal written protest by DBE Management, LLC d/b/a DBE Utility Services (DBE), to the City in protest of the City's Notice of Intent (NOI) to Award Bid No. BUT2175KR, Reclaimed Water Transmission Main Caloosahatchee River Crossing (Bid BUT2175KR), to the second lowest bidder, The HDD Company, Inc. (HDDCO), on August 3, 2021. The parties agreed that the protest was timely.

On October 13, 2021, the City referred the protest to DOAH, which was assigned to the undersigned to conduct an administrative hearing. The hearing is to determine whether the City's NOI is contrary to Chapter 2, Article VII, Division 1, Purchasing of Goods and Services of the Code of Ordinances of the City of Cape Coral, Florida, or the solicitation specifications pursuant to section 120.57(3)(f), Florida Statutes.

At the final hearing, Exhibits 1 through 20 and 22 through 32, were admitted as joint exhibits by stipulation of the parties. DBE presented the testimony of Dustin Ertle, president and chief executive officer of DBE. The City and DBE presented the testimony of Wanda Roop, the City's director of procurement.

The one volume Transcript of the final hearing was filed with DOAH on December 3, 2021. The parties timely filed proposed recommended orders that were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

The following Findings of Fact are based on the stipulations of the parties, the joint exhibits, and the facts adduced at the hearing.

Background

1. In 2018, the instant City and the City of Fort Myers entered into an interlocal agreement to construct a pipeline across the Caloosahatchee River to transmit reclaimed water from Fort Myers to Cape Coral. The reclaimed water transmission main would reduce discharges to the river while providing more reclaimed water to the City, which would help to maintain freshwater canal levels during the dry season. This water would be used for irrigation purposes and for fire protection purposes. The pipeline would be installed with no disturbance to the river bottom, avoiding harm to the environment.

2. On November 4, 2020, the City issued a Request for Pre-Qualification for specialty contractors to perform the work (RFQ RUT2113KR). Responses were due on December 8, 2020. Five contractors responded. Four were pre-qualified in a notice issued on March 9, 2021, one of which was DBE Management, Inc.

Bid Specifications

3. The ITB, Bid BUT2175KR, was sent to the four pre-qualified contractors on May 26, 2021, with a response due date of July 13, 2021, for sealed bid packages.

4. Article 3.02 of Specification Section 00100, Instructions to Bidders, setting forth the Qualification of Bidders states:

The Bidder must provide evidence that he/she is licensed to provide general construction services in the State of Florida as described per the construction plans and/or Work description. This evidence should include verifiable proof as a State of Florida

Licensed Contractor under the same name as listed in Specification Section 00300, Bid Form and as listed in Section 4 of the Bidder's Information Statement and Questionnaire form (Specification Section 00301). *A Bidder officially changing their name any time during the five (5) year period prior to the Bid submittal date should provide verifiable documentation of the name change and verifiable evidence as State of Florida Licensed Contractor. Bidders not meeting this requirement may be deemed as being non-responsive and their bid rejected.* The Bidder will be required to identify the Contractor's license number, expiration date and name of the primary qualifying agent of the Bidder. If the primary qualifying agent is not the owner, an officer, partner, a member, a joint venture managing partner, etc., the Bidder will be required to describe the relationship to the company and provide verifiable evidence of such relationship and/or license use agreement. A Bidder responding to this Invitation to Bid (ITB) as a joint venture is required to obtain bid authority under Rule 61G4-15.0022, Florida Administrative Code and include evidence of such bid authority in its response to this ITB. This information and the required submittal requirements are to be included as a part of Specification Section 00301, Bidder's Information Statement and Questionnaire and submitted as a part of the Bid package. EACH member of a partnership or qualifying joint venture must complete and submit, as a part of the Bid package, a completed Bidder's Information Statement and Questionnaire (Specification Section 00301). (emphasis added).

5. Article 19.04 of Specification Section 00100, Instructions to Bidders, states:

In evaluating whether a Bidder is responsible, Owner will consider the qualifications of the Bidder and may consider the qualifications and experience of Subcontractors and Suppliers proposed for those portions of the Work for which the identity of Subcontractors and Suppliers must be submitted as provided in the Bidding Documents. In addition, to

price the following may be considered in determining a responsible bidder: A. The Horizontal Directional Drilling (HDD) Specialty Contractors for the Cape Coral Reclaimed Water Transmission Main, Caloosahatchee River Crossing will have been pre-qualified by the City of Cape Coral for this project. B. The ability, capacity, skill and sufficiency of resources of the bidder to perform the contract. C. Whether bidder can perform the contract by providing the service promptly, or within time specified, without delay or interference. D. The character, integrity, reputation, judgement, experience and efficiency of the bidder. E. The quality of performance of the bidder in previous city contracts. F. The previous and existing compliance by the bidder with laws and ordinance relating to the contract. G. The quality, availability and adaptability of the supplies or professional or contractual services to the particular use required; and, H. The ability of the bidder to provide future maintenance, service or warranty work, if applicable. (emphasis added).

6. Article 16 of Specification Section 00100, Instructions to Bidders specifies, "[a]fter bids are opened, corrections or modifications to bids are not permitted."

7. DBE Management, Inc., timely submitted a sealed bid package on July 13, 2021. The City did not have any knowledge, however, that 14 days prior, on June 29, 2021, DBE Management, Inc., converted to DBE Management LLC. DBE's bid package did not "*provide verifiable documentation of the name change*" as required by Specification Section 00100. The requirement to inform the City of any name change is accomplished by providing a "completed Bidder's Information Statement and Questionnaire (Specification Section 00301)."

8. In the completed Bid Form, Specification Section 00300, DBE represented that it meets "the minimum qualifications as set forth in Specification Section 00100" and that "all required verifiable documentation is contained in Specification Section 00301, Bidder's Information Statement

and Questionnaire." However, DBE completed and submitted the Bid Form, Bidder's Information Statement and Questionnaire, and all other required certifications in the name of DBE Management, Inc.

9. Article 8 of Specification Section 00300, Bid Form, requests the "correct legal entity name of bidding entity." Specification Section 00301, Bidder's Information Statement and Questionnaire, requires, on page 00301-6, evidence that the bidding legal entity "currently has an active registration filed with Division of Corporation in the State of Florida (Sunbiz registration)." DBE submitted the 2020 corporate annual report for DBE Management, Inc., showing a filing date of March 24, 2020, with the Division of Corporations. No other evidence of currently active registration was submitted with DBE's bid package.

10. Article 8 of the Bid Form, Specification Section 00300, requests the "correct legal entity name of the bidding entity." In accordance with Article 5 of Specification Section 00100, Instructions to Bidders, any errors are the responsibility of the Bidder. DBE completed and submitted the Bid Form and Bidder's Information Statement and Questionnaire in the name of DBE Management, Inc.

Opening and Evaluation of Bids

11. The sealed bid packages received on July 13, 2021, were opened publicly. DBE's Bid Form reflected that DBE listed the total construction cost as \$6,739,928.00, and was the lowest bidder. HDDCO's total bid was \$9,173,179.00. HDDCO did not intervene in this bid protest to attempt to maintain its position as the intended awardee. As far as price, DBE was the lowest bidder by nearly \$2.5 million.

12. The City's evaluation began with verifying the minimum qualifications of the Bidders. Article 19.05 of the ITB provides that the City "may conduct such investigations as [it] deems necessary to establish the responsibility, qualifications, and financial ability of Bidders and any proposed

Subcontractors or Suppliers." The Article further provides that the City "may waive any irregularities or requirements requested and may request any additional information deemed necessary to satisfy its evaluation of bidders." Thus, the City may go outside the contents of a bid package and check the current Sunbiz registration of the Bidders.

13. DBE Management, Inc.'s current registration status on the Florida Division of Corporation's is "INACTIVE." Thus, DBE Management, Inc.'s bid was non-responsive. Pursuant to the bid specifications and section 2-144(12)a.1. of the City Code of Ordinances, no further action was taken on DBE Management Inc.'s bid because the corporation's inactive status affected the corporation's legal ability and capacity to enter into and perform the contract.

14. The City continued evaluating the bid packages of the responsive Bidders and on August 3, 2021, issued notice of its intention to award the contract to HDDCO. Although the City has discretion to waive requirements and request additional information, it cannot do so in a manner that is unfair and gives any Bidder a competitive advantage. At this stage of the City's evaluation, the contents of DBE's bid package, and the check of its Sunbiz status, showed that DBE Management, Inc., was an inactive Bidder.

DBE's Protest

15. The City first learned of DBE Management, Inc.'s conversion to DBE Management, LLC, after the City issued an NOI to award the contract to HDDCO on August 3, 2021. Dustin White, as a representative of DBE Management, LLC, telephoned Ms. Roop, the procurement manager for the City, to informally object to the NOI to award the contract to HDDCO and advise the City for the first time of the corporate conversion.

16. DBE submitted its formal written protest on August 11, 2021, in which it alleges that DBE Management, Inc., converted to DBE Management, LLC, under Florida law and therefore maintained an active status in accordance

with relevant provisions of Florida corporate law and was the qualified low bidder. Throughout this bid protest proceeding, DBE did not deny that it never informed the City of the corporate conversion and name change prior to or within the sealed bid package it submitted on July 13, 2021.

17. Instead, DBE argues that the City could have contacted DBE to investigate the "INACTIVE" status it discovered on Sunbiz since the next line also contained the word "CONVERTED." DBE further argues that since it was the lowest bidder, it was in the City's best interests to both investigate and waive the requirement in order to save approximately \$2.5 million.

18. Ms. Roop expressed surprise and quickly negated the idea that she or her staff would make a telephone call or reach out to a bidder once the sealed bids are publicly opened. In her opinion, such action would show favoritism. She further testified that in her 14 years of experience in handling or supervising over 300 competitive bid processes, she could not remember an instance of reaching out to any bidder during the bidding process.

Conclusions

19. DBE's bid package did not comply with the above-described bid specifications. Thus, DBE's bid was non-responsive, and it did not meet the minimum qualifications of a responsible bidder.

20. The City's investigation of DBE's minimum qualifications regarding its current Sunbiz registration was reasonable under the circumstances. Those circumstances, as described above, included a lack of notice and verifiable documentation of DBE's corporate and name change before and during the bidding process. Any further action in DBE's favor during the bidding process would have resulted in a competitive disadvantage to the other Bidders, and thus be contrary to competition.

21. Therefore, the City's August 3, 2021, NOI is not contrary to the City's Code of Ordinances, or the solicitation specifications.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties and the subject matter of this proceeding. *See* § 2-150(a)(3), Cape Coral Code of Ord.

23. DBE has standing to bring this bid protest. *See* § 2-150(a)(3), Cape Coral Code of Ord.

24. DBE has the burden of proving that the City's NOI is contrary to the City's Code of Ordinances or the solicitation specifications. *See* § 120.57(3)(f), Fla. Stat. (2021).

25. DBE's bid package did not comply with the bid specifications outlined in the Findings of Fact. Thus, DBE's bid was non-responsive and it did not meet the minimum qualifications of a responsible bidder.

26. The City's investigation of DBE's minimum qualifications regarding its current Sunbiz registration was reasonable under the circumstances. Those circumstances, outlined in the Findings of Fact, included a lack of notice and verifiable documentation of DBE's corporate and name change before and during the bidding process. Any action by the City in DBE's favor during the bidding process would have resulted in a competitive disadvantage to the other Bidders, and thus be contrary to competition.

27. Therefore, the City's August 3, 2021, NOI is not contrary to the City's Code of Ordinances, or the solicitation specifications. *Id.*

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is **RECOMMENDED** that the City Council reject DBE's bid and approve the August 3, 2021, NOI.

DONE AND ENTERED this 18th day of January, 2022, in Tallahassee, Leon County, Florida.



FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
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this 18th day of January, 2022.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.